

A MALAYAN BANKING BERHAD

v.

NOOR AZIAH AB HANA

B COURT APPEAL, PUTRAJAYA
CLEMENT SKINNER JCA
DAVID WONG DAK WAH JCA
ROHANA YUSUF JCA
[CIVIL APPEAL NO: D-02-1614-2011]
C 12 MAY 2014

D **HIRE PURCHASE:** *Hire purchase agreement - Quiet enjoyment of subject - Hire purchase of vehicle - Vehicle not road worthy due to tampering of chassis number - Whether financier relied on representation of hirer on condition of vehicle - Whether hirer bears burden of proving tampering - Whether financier liable for losses suffered by hirer*

E **EVIDENCE:** *Hearsay - Report of inspector of vehicles admitted without calling witness - Whether report admissible - Whether in accordance with rule of hearsay*

EVIDENCE: *Expert evidence - Chemist report - Hire purchase of vehicle - Tampering of chassis number - Proof of tampering - Whether tampering could only be proved by chemist report*

F The respondent obtained financial assistance from the appellant for the purchase of a vehicle and it was agreed that the finance was to be in the nature of a hire purchase agreement. The respondent paid a deposit to the original owner with the balance to be paid by the appellant. Subsequently, the respondent obtained a report
G on the condition of the vehicle from Puspakom to enable her to effect the transfer of the ownership of the vehicle. The report, which was valid for only 30 days, stated that there was tampering on the chassis number of the vehicle. The respondent was also informed by the Road Transport Department and Puspakom that
H the vehicle was not road worthy and should not be driven on the road. The respondent therefore informed the appellant that she wanted to return the vehicle and demanded for the return of payments that she had furnished the appellant. The appellant refused the respondent's demand and instead requested the
I respondent to continue to pay the monthly payments in accordance with the hire purchase agreement. The respondent, having fully-paid monthly instalments, subsequently, sought a

declaration that the hire purchase agreement was not valid and hence, void. The High Court, in holding that the hire purchase agreement was void *ab initio*, found that it was the duty of the appellant as the owner of the vehicle to ensure that the chassis number of the vehicle had not been tampered with. Hence, the appeal by the appellant and cross appeal by the respondent in respect of the quantum awarded by the court. The respondent's position was simply that there had been a total failure of consideration in that she was not able to obtain ownership of the vehicle after paying off the hire purchase agreement due to the alleged tampering of the chassis number of the vehicle.

Held (allowing appeal with costs; dismissing cross appeal with no order as to costs)

Per David Wong Dak Wah JCA delivering the judgment of the court:

- (1) She who alleges bears the burden of proof. The respondent did not discharge the burden of proving tampering. There was no duty on the appellant to verify the chassis number upon hiring. To prove tampering, there must be a chemist report. The Puspakom report produced by the respondent to prove tampering had expired as the time span of the report was only 30 days. Hence, there was no evidence of tampering of the chassis of the vehicle. (paras 14 & 15)
- (2) The Puspakom report should not have been admitted as evidence as it was against the rule of hearsay. The maker of the documents was not called to testify. Even though PW1 was authorised by Puspakom to testify in the court, such authorisation did not or could not overcome the substantive evidential hearsay rule. (para 2)
- (3) In a hire purchase agreement, the financier is actually not the owner of the vehicle in the true sense of the word. The hirer usually sourced the second hand vehicle to be purchased and the financier only comes into the picture when there was a request for finance. In granting financial help, the appellant had in fact relied on the representation by the respondent that there was no defect whatsoever in respect of the ownership of the vehicle. The fact that the ownership of the vehicle was transferred from the original owner of the vehicle to the appellant showed that there was nothing for the appellant to be suspicious of and was a *bona fide* purchaser without notice of any tampering. (para 17)

- A (4) Since the tampering of the chassis number could only be obtained by chemist report, the appellant had no duty to ensure that there had not been any tampering of the chassis of the vehicle by commissioning a chemist report. To impose such a duty was not commercially viable in the context of a hire purchase agreement. There was no evidence that the appellant was a party or even in any way aware of the tampering and thus, could not be held liable for any loss suffered by the respondent. (paras 21 & 22)
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- C (5) The respondent had not sought an appropriate remedy in ensuring that the ownership of the vehicle could be transferred to her despite having fully paid the amount due under the hire purchase agreement and the vehicle continued to be in her possession. Until the respondent establishes positively that she was not the beneficial owner, her suit was pre-mature. (para 23)
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Bahasa Malaysia *Translation Of Headnotes*

- E Responden memperoleh bantuan kewangan daripada perayu bagi pembelian sebuah kenderaan dan adalah dipersetujui bahawa kewangan tersebut bersifat perjanjian sewa beli. Responden membayar deposit kepada pemilik asal dengan bakinya akan dibayar oleh perayu. Kemudian, responden memperoleh laporan mengenai keadaan kenderaan tersebut daripada Puspakom untuk membolehkannya membuat penukaran hak milik kenderaan tersebut.
- F Laporan tersebut, yang sah bagi tempoh 30 hari sahaja, menyatakan bahawa terdapat usikan pada nombor casis kenderaan tersebut. Responden juga dimaklumkan oleh Jabatan Pengangkutan Jalan dan Puspakom bahawa kenderaan tersebut tidak boleh digunakan dan tidak boleh dipandu di jalan raya. Responden, dengan itu, memaklumkan kepada perayu bahawa dia hendak mengembalikan kenderaan tersebut dan menuntut pengembalian bayaran-bayaran yang telah dibuat olehnya kepada perayu. Perayu menolak tuntutan responden dan sebaliknya meminta responden meneruskan membayar ansuran bulanan menurut perjanjian sewa beli. Responden, setelah selesai membayar kesemua ansuran bulanan, kemudian, memohon deklarası bahawa perjanjian sewa beli tersebut tidak sah dan oleh itu, adalah batal. Mahkamah Tinggi, dalam memutuskan bahawa perjanjian sewabeli tersebut adalah batal *ab initio*, mendapati bahawa adalah tanggungjawab perayu sebagai pemilik kenderaan tersebut untuk memastikan
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bahawa nombor casis kenderaan tersebut tidak diusik. Dengan itu, rayuan oleh perayu dan rayuan balas oleh responden berkaitan dengan kuantum yang diawardkan oleh mahkamah. Kedudukan responden adalah semata-mata bahawa terdapat kegagalan balasan secara keseluruhan di mana dia tidak berjaya memperolehi pemilikan kenderaan tersebut selepas selesai membayar perjanjian sewa beli disebabkan oleh usikan nombor pada casis kenderaan seperti yang didakwa.

Diputuskan (membenarkan rayuan dengan kos; menolak rayuan balas tanpa perintah untuk kos)

Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

- (1) Seseorang yang mendakwa, mempunyai beban untuk membuktikan. Responden tidak melepaskan beban untuk membuktikan usikan. Untuk membuktikan usikan, perlu ada laporan kimia. Laporan Puspakom yang dikemukakan oleh responden untuk membuktikan usikan telah luput kerana tempoh masa laporan tersebut hanya 30 hari. Maka, tidak ada keterangan usikan pada casis kenderaan tersebut.
- (2) Laporan Puspakom tidak sewajarnya diterima sebagai keterangan kerana ia adalah bertentangan dengan kaedah dengar cakap. Pembuat dokumen-dokumen tidak dipanggil untuk memberikan keterangan. Walaupun PW1 diberi kuasa oleh Puspakom untuk memberikan keterangan di mahkamah, kuasa sedemikian tidak atau tidak boleh mengatasi keterangan substantif kaedah dengar cakap.
- (3) Dalam sesuatu perjanjian sewa beli, pembiaya sebenarnya bukan pemilik kenderaan dalam maksud yang sebenar. Penyewa biasanya mendapatkan kenderaan terpakai untuk dibeli dan pembiaya hanya terlibat apabila terdapat permintaan untuk pembiayaan. Dalam memberikan bantuan kewangan, perayu sebenarnya telah bergantung kepada representasi oleh responden bahawa tidak ada apa-apa kecacatan berkaitan dengan pemilikan kenderaan tersebut. Fakta bahawa pemilikan kenderaan telah dipindah milik daripada pemilik sebenar kenderaan kepada perayu menunjukkan bahawa tidak ada apa-apa untuk perayu berasa curiga dan adalah pembeli suci hati tanpa notis mengenai apa-apa usikan.

- A (4) Oleh sebab usikan nombor casis hanya boleh diperolehi melalui laporan kimia, perayu tidak bertanggungjawab untuk memastikan bahawa tidak ada apa-apa usikan pada casis kenderaan dengan mengarahkan laporan kimia. Untuk meletakkan tanggungjawab sedemikian tidak berdaya maju dari segi komersial dalam konteks perjanjian sewa beli. Tidak ada keterangan bahawa perayu adalah pihak atau menyedari dalam apa cara sekalipun tentang usikan dan dengan itu, tidak boleh diputuskan sebagai bertanggung bagi apa-apa kerugian yang dialami oleh responden.
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- C (5) Responden tidak memohon remedi yang sewajarnya dalam memastikan bahawa hak milik kenderaan tersebut boleh dipindah milik kepadanya walaupun telah membayar penuh jumlah yang terhutang di bawah perjanjian sewa beli tersebut dan kenderaan tersebut terus berada dalam milikannya.
- D Sehingga responden membuktikan secara positif bahawa dia bukan pemilik benefisial, guamannya adalah pramatang.

Case(s) referred to:

- E *Ahmad Ismail v. Malayan Motor Co & Anor* [1972] 1 LNS 5 HC (*refd*)
Ketua Polis Negeri Sembilan & Anor v. Manoharan Dorasamy [2004] 1 CLJ 101 FC (*foli*)

Legislation referred to:

- Criminal Procedure Code, s. 413
Police Act 1967, s. 24(4)
- F Road Transport Act 1987, ss. 8, 10, 11, 12

For the appellant - Wan Azman Wan Ahmad; M/s Lua & Mansor
For the respondent - Wan Jawahir Harun; M/s Wan Jawahir & Co

- G *[Appeal from High Court, Kota Bharu; Suit No: 22-70-2007]*
Reported by S Barathi

JUDGMENT

- H **David Wong Dak Wah JCA:**

Introduction:

- I [1] This is an appeal against the decision of the High Court in which the learned judge sustained the plaintiff/respondent's claim for a declaration that a hire purchase agreement between the respondent and the defendant/appellant dated 19 April 2003 is not valid and void.

[2] There is also a cross-appeal by the respondent in respect of the quantum awarded by the High Court. A

[3] We heard the appeal and cross-appeal and after due consideration to the respective submissions of counsel, we allowed the appeal and dismissed the cross-appeal. We now give our reasons. B

Background Facts

[4] On or about early 2000, the respondent approached the appellant for finance to purchase a second hand Mercedes Benz bearing registration number WGT 7717 (the vehicle). The appellant accepted the application for finance and agreed that such finance is to be in the nature of a hire purchase agreement. The purchase price of the vehicle is in the sum of RM227,728. C D

[5] The deposit of RM48,150 was paid by the respondent to the appellant for payment to the original owner with the balance to be paid by the appellant. The respondent then was to make a monthly instalment of RM2,433 for 72 months under the hire purchase agreement commencing from 19 April 2000 to repay the facility granted by the appellant. E

[6] In 2004, the respondent went to Jabatan Pengangkutan Jalan (JPJ) to enquire about the procedure of effecting the transfer of ownership of the vehicle. She was then informed that she had to get a report on the condition of the vehicle from Puspakom before a transfer is allowed. The respondent obtained a report from Puspakom dated 17 December 2004 which can be found in exh. P1 (p. 144 record of appeal). That report was only valid for 30 days from the date of the report. The report also states that there was tampering on the chassis number of the vehicle. The maker of the report is one Zakaria bin Yusof of Puspakom Wangsa Maju, Kuala Lumpur. F G

[7] The respondent was also informed by JPJ and Puspakom that the vehicle was not road-worthy and should not be driven on the road. As a result of which, the respondent claimed she had stopped driving the vehicle and informed the appellant that she wanted to return the vehicle and demanded for the return of payments that she had furnished to the appellant. H I

A [8] The appellant refused the respondent's demand and instead requested the respondent to continue to pay the monthly payments in accordance with the hire purchase agreement which the respondent did until the monthly instalments were fully paid off on 19 March 2006.

B [9] However, the respondent on 2007 took out this suit to seek a declaration that the hire purchase agreement is not valid and hence void.

C **High Court Decision**

[10] The learned judge after reviewing the totality of the evidence held that the hire purchase agreement was void *ab initio*. His reasons were these.

D [11] He found that it was the duty of the appellant as the owner of the vehicle to ensure that the chassis number of the vehicle had not been tampered with. Arising from that the learned judge said that the appellant should have sent the car to Puspakom before the hire purchase agreement was entered to verify the genuineness of the chassis number.

E [12] The learned judge also found that it was unreasonable to impose that duty on the respondent, as at that material time the respondent did not have ownership of the vehicle.

F **Our Grounds Of Decision**

[13] To recap, the respondent's position is simply that there has been a total failure of consideration in that she was not able to obtain ownership of the vehicle after paying off the hire purchase agreement. And her inability to obtain ownership is due to the alleged tampering of the chassis number of the vehicle.

G **Proof Of Tampering**

H [14] As this is her allegation, the law is trite and it simply demands that she who alleges bears the burden of proof. We are not in agreement with the learned judge as we find the respondent did not discharge the burden of proving tampering. Secondly, we are of the view that there is no duty on the appellant to verify the chassis number upon hiring. In this case, in I proving the tampering the respondent produced the Puspakom report. Learned counsel for the appellant attacked the usefulness of that report in that the report had expired as the time span of

the report was only 30 days. It was also submitted that there was no chemist report tendered in court to prove that there was in fact tampering.

[15] We find merit in learned counsel's submission in respect of the need for a chemist report as proof of tampering for the simple reason that PW1's (Rahim bin Tuan Mat) had stated in his testimony that to prove tampering there must be a chemist report. PW1's evidence is that of the respondent and needless to say that evidence forms part of the respondent's case. What that simply means is that the respondent's case had been damaged by none other than her own witness. It also means that the respondent case contains no evidence of tampering of the chassis of the vehicle.

[16] Further we say that P1 should not have been admitted as evidence for the simple reason that it is against the rule of hearsay. The maker of documents – P1 – one Zakaria bin Yusof was not called to testify. PW1 was authorised by Puspakom to testify in court but such authorisation does not or could not overcome the substantive evidential hearsay rule. With that we now move to the appellant's duty to ensure that there was no tampering of the chassis number of the vehicle.

Appellant's Duty

[17] The learned judge had found that the appellant had the duty to ensure that the chassis number of the vehicle had not been tampered with before hiring. With respect we do not agree with the learned judge for the following reasons. It should be noted that in a hire purchase agreement, the financier is actually not the owner of the vehicle in the true sense of the word. What usually happens in reality as in this case is that the hirer usually sourced out the second hand vehicle to be purchased and the financier like the appellant only comes into the picture when there is a request for finance. Here there is no dispute that the deposit of RM48,150 was paid by the respondent. And in granting financial help, the appellant in fact had relied on the representation by the respondent that there is no defect whatsoever in respect of the ownership of the vehicle. To expect the appellant to ensure the vehicle is not tampered with where in fact the vehicle was sourced out by the respondent, does not make commercial sense and is unreasonable.

- A [18] In any event the fact that the ownership of vehicle was transferred from the original owner of the vehicle to the appellant shows that there was nothing for the appellant to be suspicious of and so to speak, is a *bona fide* purchaser without notice of any tampering. In this context, of significance is s. 10(3) of the Road Transport Act specifically states as follows:
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(3) No motor vehicle shall be registered unless:

(a) such vehicle bears a clear, distinct and untampered engine and chassis number; and

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(b) the prescribed fee has been paid:

Provided that paragraph (a) shall not apply to any electric motor vehicle which has no engine number.

- D The approval of the transfer by the Registrar of JPJ to the appellant in our view speaks for itself.

- E [19] Of relevance to this issue under consideration is the Federal Court case of *Ketua Polis Ibu Pejabat Kontinjen Polis Seremban Negeri Sembilan & Ors v. Manoharan a/l Dorasamy* [2004] 1 CLJ 101. The facts there are these. The respondent there had in February 1994 purchased a car in Kota Kinabalu, Sabah which was later transported over to Peninsular Malaysia. The registration of the car was re-registered in Peninsular Malaysia by the Road Transport Department and prior to that re-registration the Department had inspected the engine and chassis numbers of the car. After finding that there was no tampering the car was re-registered as NAJ 1912 with the endorsement that the respondent as its registered owner.
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- G However, the car was blacklisted by the second appellant there on the ground that the relevant documents might have been forged by a syndicate in Sabah. On 28 April 1994, the car was detained by the first appellant for the reason that it was stolen property. The car was later released back to the respondent on 23 January 1995 on bond pursuant to s. 413 Criminal Procedure Code ('CPC'). The release was triggered by a chemist report that although the car's engine number had been tampered with, there was no way of knowing its original number or the car's original owner.
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The respondent took out an originating summons to seek among others a declaration that he was the beneficial owner of the vehicle and also for damages. The learned High Court dismissed the originating summons premised on the ground that the detention was legal. On appeal, however, the Court of Appeal allowed the claim and ordered for damages to be assessed ruling that the detention, upon a proper reading of s. 413 of the CPC and s. 24(4) of the Police Act 1967 ('PA'), was beyond the period permissible under the law. The appellants appealed to the Federal Court and one of the questions posed was this:

(iii) whether ss. 8, 10, 11 and 12 of the Road Transport Act 1987 ('RTA') impose a duty on the second appellant as the Registrar of motor vehicles to inspect every vehicle submitted for registration or transfer of registration.

[20] Abdul Hamid Mohamad JCA (as he then was and was sitting as a member of the Federal Court) said as follows:

So, reading ss. 10 and 12 together, it is clear to me that the sections impose a duty on the registrar to inspect every vehicle before registration or transfer of registration. So, my answer to the third question is in the affirmative.

But how the inspection is to be done is another matter. Is it sufficient that a normal physical examination be done or must the examination be done by a chemist? We see that in this case, the tempering was only discovered through the examination conducted by the chemist. The tempering was not discovered by all the earlier physical examinations by the second appellant and the respondent's own mechanic together with the respondent.

I am of the view that it is unreasonable and not practical to require every inspection of the engine and chassis numbers of every vehicle to be done by the chemist, for the purpose of registration. It involves sending every vehicle to the Chemistry Department for such examination. That clearly would delay the process of registration of motor vehicles, considering the number of vehicles being registered every day. Indeed, the public would be the first to complain about the delay. So, in my view it is unreasonable to require an examination of every vehicle to be conducted by the chemist to ascertain the engine and chassis number before registration. Normal physical examination by officers of the second appellant would suffice. After all, s. 12(1) only empowers the second appellant to inspect the vehicle. The sub-section clearly means inspection by the second appellant. The court should not read more into the provision of the law.

A So, on the third question, I would answer it in the affirmative, even though I would not go so far as to require the second appellant to have the vehicle sent to and be examined by the chemist.

B Regarding the order made by the Court of Appeal, even though the original engine and chassis numbers and therefore the original owner could not be ascertained, but since it was never proved that the vehicle was a stolen vehicle (even though it was suspected to be so), since there is no dispute that the respondent is a *bona fide* purchaser, since the vehicle had been registered in the respondent's name and since the vehicle was seized from and later returned to the respondent, the orders made by the Court of Appeal are fair and appropriate.

[21] Even though the Federal Court case relates to the duty of the Registrar of JPJ, we see no reason as to why we should not adopt the reasoning of the rationale therein. Hence we disagree with the view expressed by the learned judge. Since tampering of the chassis number can only be obtained by chemist report we are of the view that the appellant had no duty to ensure that there has not been any tampering of the chassis of the vehicle by commissioning a chemist report. To impose such a duty in our view is not commercially viable in the context of a hire purchase agreement. The rationale for our view is that in a hire purchase agreement scenario, the respondent is the one who purchased the car directly from the original owner. The appellant in our view would rely on the representation of the respondent to finance the purchase.

[22] We would refer to *Ahmad Ismail v. Malayan Motor Company & Anor* [1972] 1 LNS 5; [1973] 1 MLJ 117. The Federal Court in that case dismissed the claim of the hirer of a second hand vehicle against the finance company when the performance of the contract was rendered impossible to perform due to intervention by a third party which was the police who had seized the vehicle on suspicion of it being stolen. The hirer's claim was premised on the implied condition that the finance company would pass good title of the vehicle to the hirer. The Federal Court held that when the deprivation of the aforesaid implied condition is not occasioned by the finance company/owner, it is therefore not liable. Similarly here, there is no evidence that the appellant was a party or even in any way aware of the tampering and thus could not be held liable for any loss suffered by the respondent.

Respondent's Remedy

[23] In our view, the respondent had not sought an appropriate remedy in ensuring that the ownership of the vehicle can be transferred to her. It is undisputed that she had fully paid the amount due under the hire purchase agreement and the vehicle continues to be in her possession. The respondent could very well do what was done by the respondent in the Federal Court case of *Ketua Polis Pejabat Kontinjen Polis Seremban Negeri Sembilan & Anor v. Manoharan a/l Dorasamy (supra)*. In that case, the respondent sought a declaration that he is the beneficial owner of the relevant vehicle and had cited the Registrar of JPJ as one of the defendants. In that case the vehicle was suspected to be stolen property but in view of the fact that the original number of the engine and original owner could not be ascertained, the Federal Court affirmed the Court of Appeal decision declaring that the beneficial owner of the relevant vehicle was the respondent there. Whether or not the respondent herein would succeed in a similar application is a matter of conjecture. But be that as it may, until such time that the respondent can establish positively that she is not the beneficial owner, her suit so to speak is premature.

Conclusion

[24] To summarise, it is our view that the respondent had failed to prove that there is tampering of the chassis number of the vehicle and even if tampering is proved, she had failed to prove that the appellant was responsible for the tampering. Accordingly we see no legal basis for the learned judge to sustain the claims of the respondent. Hence we allow the appeal with costs in the sum of RM15,000 to the appellant. The decision of the High Court is also set aside. We also order the respondent repay whatever amount received by her to the appellant.

[25] Finally in view of our decision on the appellant's appeal, we are constrained to dismiss the cross-appeal of the respondent with no order as to costs.

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